SENATE BILL NO. 1315

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the House Committee for Courts of Justice

on _____)

(Patrons Prior to Substitute--Senators McClellan and Favola [SB 1383])

A BILL to amend and reenact §§ 19.2-120, 19.2-163.03, and 19.2-299 of the Code of Virginia and to amend the Code of Virginia by adding in Article 1 of Chapter 16 of Title 19.2 a section numbered 19.2-271.6, relating to criminal proceedings; consideration of mental condition and intellectual and developmental disabilities.

Be it enacted by the General Assembly of Virginia:

1. That §§ 19.2-120, 19.2-163.03, and 19.2-299 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding in Article 1 of Chapter 16 of Title 19.2 a section numbered 19.2-271.6 as follows:

§ 19.2-120. Admission to bail.

Prior to conducting any hearing on the issue of bail, release or detention, the judicial officer shall, to the extent feasible, obtain the person's criminal history.

A. A person who is held in custody pending trial or hearing for an offense, civil or criminal contempt, or otherwise shall be admitted to bail by a judicial officer, unless there is probable cause to believe that:

1. He will not appear for trial or hearing or at such other time and place as may be directed, or

2. His liberty will constitute an unreasonable danger to himself or the public.

B. The judicial officer shall presume, subject to rebuttal, that no condition or combination of conditions will reasonably assure the appearance of the person or the safety of the public if the person is currently charged with:

1. An act of violence as defined in § 19.2-297.1;

2. An offense for which the maximum sentence is life imprisonment or death;

3. A violation of § 18.2-248, 18.2-248.01, 18.2-255, or 18.2-255.2 involving a Schedule I or II controlled substance if (i) the maximum term of imprisonment is 10 years or more and the person was previously convicted of a like offense or (ii) the person was previously convicted as a "drug kingpin" as defined in § 18.2-248;

4. A violation of § 18.2-308.1, 18.2-308.2, or 18.2-308.4 and which relates to a firearm and provides for a mandatory minimum sentence;

5. Any felony, if the person has been convicted of two or more offenses described in subdivision 1 or 2, whether under the laws of the Commonwealth or substantially similar laws of the United States;

6. Any felony committed while the person is on release pending trial for a prior felony under federal or state law or on release pending imposition or execution of sentence or appeal of sentence or conviction;

7. An offense listed in subsection B of § 18.2-67.5:2 and the person had previously been convicted of an offense listed in § 18.2-67.5:2 or a substantially similar offense under the laws of any state or the United States and the judicial officer finds probable cause to believe that the person who is currently charged with one of these offenses committed the offense charged;

8. A violation of § 18.2-374.1 or 18.2-374.3 where the offender has reason to believe that the solicited person is under 15 years of age and the offender is at least five years older than the solicited person;

9. A violation of § 18.2-46.2, 18.2-46.3, 18.2-46.5, or 18.2-46.7;

10. A violation of § 18.2-36.1, 18.2-51.4, 18.2-266, or 46.2-341.24 and the person has, within the past five years of the instant offense, been convicted three times on different dates of a violation of any combination of these Code sections, or any ordinance of any county, city, or town or the laws of any other state or of the United States substantially similar thereto, and has been at liberty between each conviction;

11. A second or subsequent violation of § 16.1-253.2 or 18.2-60.4 or a substantially similar offense under the laws of any state or the United States;

12. A violation of subsection B of § 18.2-57.2;

13. A violation of subsection C of § 18.2-460 charging the use of threats of bodily harm or force to knowingly attempt to intimidate or impede a witness;

14. A violation of § 18.2-51.6 if the alleged victim is a family or household member as defined in § 16.1-228; or

15. A violation of § 18.2-355, 18.2-356, 18.2-357, or 18.2-357.1.

C. The judicial officer shall presume, subject to rebuttal, that no condition or combination of conditions will reasonably assure the appearance of the person or the safety of the public if the person is being arrested pursuant to § 19.2-81.6.

D. For a person who is charged with an offense giving rise to a rebuttable presumption against bail, any judicial officer may set or admit such person to bail in accordance with this section.

E. The judicial officer shall consider the following factors and such others as it deems appropriate in determining, for the purpose of rebuttal of the presumption against bail described in subsection B, whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of the public:

1. The nature and circumstances of the offense charged;

2. The history and characteristics of the person, including his character, physical and mental condition, including a diagnosis of an intellectual or developmental disability as defined in § 37.2-100, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, membership in a criminal street gang as defined in § 18.2-46.1, and record concerning appearance at court proceedings; and

3. The nature and seriousness of the danger to any person or the community that would be posed by the person's release.

F. The judicial officer shall inform the person of his right to appeal from the order denying bail or fixing terms of bond or recognizance consistent with § 19.2-124.

G. If the judicial officer sets a secured bond and the person engages the services of a licensed bail bondsman, the magistrate executing recognizance for the accused shall provide the bondsman, upon request, with a copy of the person's Virginia criminal history record, if readily available, to be used by the

bondsman only to determine appropriate reporting requirements to impose upon the accused upon his release. The bondsman shall pay a $15 fee payable to the state treasury to be credited to the Literary Fund, upon requesting the defendant's Virginia criminal history record issued pursuant to § 19.2-389. The bondsman shall review the record on the premises and promptly return the record to the magistrate after reviewing it.

§ 19.2-163.03. Qualifications for court-appointed counsel.

A. Initial qualification requirements. An attorney seeking to represent an indigent accused in a criminal case, in addition to being a member in good standing of the Virginia State Bar, shall meet the specific criteria required for each type or level of case. The following criteria shall be met for qualification and subsequent court appointment:

1. Misdemeanor case. To initially qualify to serve as counsel appointed pursuant to § 19.2-159 for an indigent defendant charged with a misdemeanor, the attorney shall:

~~(i) if~~ a. If an active member of the Virginia State Bar for less than one year, have completed ~~six~~ eight hours of MCLE-approved continuing legal education developed by the Indigent Defense Commission, ~~or~~ two of which shall cover the representation of individuals with behavioral or mental health issues and individuals with intellectual or developmental disabilities as defined in § 37.2-100;

~~(ii) if~~ b. If an active member of the Virginia State Bar for one year or more, either complete the ~~six~~ eight hours of approved continuing legal education developed by the Commission, two of which shall cover the representation of individuals with behavioral or mental health disorders and individuals with intellectual or developmental disabilities as defined in § 37.2-100, or certify to the Commission that he has represented, in a district court within the past year, four or more defendants charged with misdemeanors~~,~~; or

~~(iii) be~~ c. Be qualified pursuant to this section to serve as counsel for an indigent defendant charged with a felony.

2. Felony case.

a. To initially qualify to serve as counsel appointed pursuant to § 19.2-159 for an indigent defendant charged with a felony, the attorney shall (i) have completed the ~~six~~ eight hours of MCLE-

approved continuing legal education developed by the Commission, two of which shall cover the representation of individuals with behavioral or mental health disorders and individuals with intellectual or developmental disabilities as defined in § 37.2-100, and (ii) certify that he has participated as either lead counsel or co-counsel in four felony cases from their beginning through to their final resolution, including appeals, if any.

b. If the attorney has been an active member of the Virginia State Bar for more than one year and certifies that he has participated, within the past year, as lead counsel in four felony cases through to their final resolution, including appeals, if any, the requirement to complete ~~six~~ eight hours of continuing legal education and the requirement to participate as co-counsel shall be waived.

c. If the attorney has been an active member of the Virginia State Bar for more than one year and certifies that he has participated, within the past five years, as lead counsel in five felony cases through to their final resolution, including appeals, if any, the requirement to participate as either lead counsel or co-counsel in four felony cases within the past year shall be waived.

3. Juvenile and domestic relations case.

a. To initially qualify to serve as appointed counsel in a juvenile and domestic relations district court pursuant to subdivision C 2 of § 16.1-266, the attorney shall (i) have completed the ~~six~~ eight hours of MCLE-approved continuing legal education developed by the Commission, two of which shall cover the representation of individuals with behavioral or mental health disorders and individuals with intellectual or developmental disabilities as defined in § 37.2-100, (ii) have completed four additional hours of MCLE-approved continuing legal education on representing juveniles developed by the Commission, and (iii) certify that he has participated as either lead counsel or co-counsel in four cases involving juveniles in a juvenile and domestic relations district court.

b. If the attorney has been an active member of the Virginia State Bar for more than one year and certifies that he has, within the past year, been lead counsel in four cases involving juveniles in juvenile and domestic relations district court, the requirement to complete the ~~10~~ 12 hours of continuing legal education shall be waived.

c. If the attorney has been an active member of the Virginia State Bar for more than one year and certifies that he has participated, within the past five years in five cases involving juveniles in a juvenile and domestic relations district court, the requirement to participate as either lead counsel or co-counsel in four juvenile cases shall be waived.

B. Requalification requirements. After initially qualifying as provided in subsection A, an attorney shall maintain his eligibility for certification biennially by notifying the Commission of completion of at least ~~six~~ eight hours of Commission and MCLE-approved continuing legal education, two of which shall cover the representation of individuals with behavioral or mental health disorders and individuals with intellectual or developmental disabilities as defined in § 37.2-100. The Commission shall provide information on continuing legal education programs that have been approved.

In addition, to maintain eligibility to accept court appointments under subdivision C 2 of § 16.1-266, an attorney shall complete biennially thereafter four additional hours of MCLE-approved continuing legal education on representing juveniles, certified by the Commission.

C. Waiver and exceptions. The Commission or the court before which a matter is pending, may, in its discretion, waive the requirements set out in this section for individuals who otherwise demonstrate their level of training and experience. A waiver of such requirements pursuant to this subsection shall not form the basis for a claim of error at trial, on appeal, or in any habeas corpus proceeding.

§ 19.2-271.6. Evidence of defendant's mental condition admissible; notice to Commonwealth.

A. In any criminal case, evidence concerning the defendant's mental condition at the time of the alleged offense, including expert testimony, is relevant and shall be admitted if such evidence (i) tends to show the defendant did or did not have the mental state required for the offense charged and (ii) is otherwise admissible pursuant to the general rules of evidence. For purposes of this section, to establish the underlying mental condition the defendant must show that his condition existed at the time of the offense and that the condition satisfies the diagnostic criteria for (a) an autism spectrum disorder as defined in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association or (b) a developmental disability or intellectual disability as defined in § 37.2-100.

If a defendant intends to introduce evidence pursuant to this section, he, or his counsel, shall give notice in writing to the attorney for the Commonwealth, at least 60 days prior to his trial in circuit court, or at least 21 days prior to trial in general district court or juvenile and domestic relations district court, or at least 14 days if the trial date is set within 21 days of last court appearance, of his intention to present such evidence. In the event that such notice is not given, and the person proffers such evidence at his trial as a defense, then the court may in its discretion either allow the Commonwealth a continuance or, under appropriate circumstances, bar the defendant from presenting such evidence. The period of any such continuance shall not be counted for speedy trial purposes under § 19.2-243.

B. Nothing in this section shall be construed to affect the requirements for a defense of insanity pursuant to Chapter 11 (§ 19.2-167 et seq.).

C. In addition to the requirements of this section, the defendant, when introducing evidence pursuant to this section, shall follow all discovery rules as required by law and the Rules of Supreme Court.

§ 19.2-299. Investigations and reports by probation officers in certain cases.

A. When a person is tried in a circuit court (i) upon a charge of assault and battery in violation of § 18.2-57 or 18.2-57.2, stalking in violation of § 18.2-60.3, sexual battery in violation of § 18.2-67.4, attempted sexual battery in violation of § 18.2-67.5, or driving while intoxicated in violation of § 18.2-266, and is adjudged guilty of such charge, unless waived by the court and the defendant and the attorney for the Commonwealth, the court may, or on motion of the defendant shall; or (ii) upon a felony charge not set forth in subdivision (iii) below, the court may when there is a plea agreement between the defendant and the Commonwealth and shall, unless waived by the defendant and the attorney for the Commonwealth, when the defendant pleads guilty or nolo contendere without a plea agreement or is found guilty by the court after a plea of not guilty or nolo contendere; or (iii) the court shall when a person is charged and adjudged guilty of a felony violation, or conspiracy to commit or attempt to commit a felony violation, of § 18.2-46.2, 18.2-46.3, 18.2-48, clause (2) or (3) of § 18.2-49, § 18.2-61, 18.2-63, 18.2-64.1, 18.2-64.2, 18.2-67.1, 18.2-67.2, 18.2-67.3, 18.2-67.4:1, 18.2-67.5, 18.2-67.5:1, 18.2-355, 18.2-356, 18.2-357, 18.2-361, 18.2-362, 18.2-366, 18.2-368, 18.2-370, 18.2-370.1, or 18.2-370.2, or any attempt to commit or

conspiracy to commit any felony violation of § 18.2-67.5, 18.2-67.5:2, or 18.2-67.5:3, direct a probation officer of such court to thoroughly investigate and report upon the history of the accused, including a report of the accused's criminal record as an adult and available juvenile court records, any information regarding the accused's participation or membership in a criminal street gang as defined in § 18.2-46.1, and all other relevant facts, to fully advise the court so the court may determine the appropriate sentence to be imposed. Unless the defendant or the attorney for the Commonwealth objects, the court may order that the report contain no more than the defendant's criminal history, any history of substance abuse, any physical or health-related problems as may be pertinent, including any diagnoses of an intellectual or developmental disability as defined in § 37.2-100, and any applicable sentencing guideline worksheets. This expedited report shall be subject to all the same procedures as all other sentencing reports and sentencing guidelines worksheets. The probation officer, after having furnished a copy of this report at least five days prior to sentencing to counsel for the accused and the attorney for the Commonwealth for their permanent use, shall submit his report in advance of the sentencing hearing to the judge in chambers, who shall keep such report confidential. Counsel for the accused may provide the accused with a copy of the presentence report. The probation officer shall be available to testify from this report in open court in the presence of the accused, who shall have been provided with a copy of the presentence report by his counsel or advised of its contents and be given the right to cross-examine the investigating officer as to any matter contained therein and to present any additional facts bearing upon the matter. The report of the investigating officer shall at all times be kept confidential by each recipient, and shall be filed as a part of the record in the case. Any report so filed shall be made available only by court order and shall be sealed upon final order by the court, except that such reports or copies thereof shall be available at any time to any criminal justice agency, as defined in § 9.1-101, of this or any other state or of the United States; to any agency where the accused is referred for treatment by the court or by probation and parole services; and to counsel for any person who has been indicted jointly for the same felony as the person subject to the report. Subject to the limitations set forth in § 37.2-901, any report prepared pursuant to the provisions hereof shall without court order be made available to counsel for the person who is the subject of the report if that person (a) is charged with a felony subsequent to the time of the preparation of the report or (b) has

been convicted of the crime or crimes for which the report was prepared and is pursuing a post-conviction remedy. Such report shall be made available for review without a court order to incarcerated persons who are eligible for release by the Virginia Parole Board, or such person's counsel, pursuant to regulations promulgated by the Virginia Parole Board for that purpose. The presentence report shall be in a form prescribed by the Department of Corrections. In all cases where such report is not ordered, a simplified report shall be prepared on a form prescribed by the Department of Corrections. For the purposes of this subsection, information regarding the accused's participation or membership in a criminal street gang may include the characteristics, specific rivalries, common practices, social customs and behavior, terminology, and types of crimes that are likely to be committed by that criminal street gang.

B. As a part of any presentence investigation conducted pursuant to subsection A when the offense for which the defendant was convicted was a felony, the court probation officer shall advise any victim of such offense in writing that he may submit to the Virginia Parole Board a written request (i) to be given the opportunity to submit to the Board a written statement in advance of any parole hearing describing the impact of the offense upon him and his opinion regarding the defendant's release and (ii) to receive copies of such other notifications pertaining to the defendant as the Board may provide pursuant to subsection B of § 53.1-155.

C. As part of any presentence investigation conducted pursuant to subsection A when the offense for which the defendant was convicted was a felony drug offense set forth in Article 1 (§ 18.2-247 et seq.) of Chapter 7 of Title 18.2, the presentence report shall include any known association of the defendant with illicit drug operations or markets.

D. As a part of any presentence investigation conducted pursuant to subsection A, when the offense for which the defendant was convicted was a felony, not a capital offense, committed on or after January 1, 2000, the defendant shall be required to undergo a substance abuse screening pursuant to § 18.2-251.01.

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